Supreme Court, U. S.
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In The
Supreme Court of the United States

OCTOBER TERM 1974

No. ~~73~~ 1942

RICHARD ERZNOZNIK, as Manager
of the University Drive-In Theatre,

Appellant,

-vs-

CITY OF JACKSONVILLE, a municipal
corporation,

Appellee.

APPELLANT'S
JURISDICTIONAL STATEMENT

William H. Maness, Esquire
603 Florida Theatre Building
Jacksonville, Florida 32202

ATTORNEY FOR APPELLANT

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In The
Supreme Court of the United States

OCTOBER TERM 1974

No. ———

RICHARD ERZNOZNIK, as Manager
of the University Drive-In Theatre,

Appellant,

-vs-

CITY OF JACKSONVILLE, a municipal
corporation,

Appellee.

1. NATURE OF APPEAL

Appellant – Richard Erznoznik – hereafter called "Erznoznik" – appeals from an adverse, final judgment of the District Court of Appeal, First District of Florida, hereafter called "The First District" – and says:

2. JURISDICTIONAL STATEMENT

(a) *Opinion Below*

The First District's opinion was rendered Per Curiam, January 8, 1974, re-hearing denied February 5, 1974, and is reported at 288 So.2d 260 [a copy of the opinion is appended as Exhibit I] thereby affirming a decree of the Circuit Court of Duval County, entered January 30, 1973 upholding the Constitutionality of the Ordinance under attack on First Amendment grounds.

The Florida Supreme Court [divided four to three] denied review April 25, 1974; that Order, denying Petition for Certiorari, has not been reported but a copy is appended as Exhibit II.

(b) *Jurisdictional Ground Involved*

(i) *Nature of Proceeding*

Erznoznik appeals from an adverse judgment of The First District sustaining the validity of a Jacksonville, Florida City Ordinance criminalizing – as a public nuisance per se – the exhibition at a drive-in theater of – "any motion picture" having scenes in which the "human male or female bare buttocks, or human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture . . . is visible from any public street or public place."

The statute under which this appeal is brought is 28 U.S.C. 1257(2).

(ii) The First District's final judgment was announced on January 8, 1974; rehearing was denied February 5, 1974.

The Florida Supreme Court – three of seven Judges dissenting – refused certiorari on April 25, 1974.

Notice of Appeal was filed June 13, 1974 in the District Court of Appeal, First District of Florida, Post Office Box 87, Tallahassee, Florida 32302. [Exhibit III]

(iii) *Jurisdictional Statute*

Jurisdiction is conferred by 28 U.S.C. 1257(2) in that appeal is taken from a judgment of "the highest court of a state in which a decision could be had" – in a situation "where is drawn in question the statute of . . . (a) state on the ground of its being repugnant to the Constitution . . . of the United States and the decision is in favor of its validity."

(iv) *Cases Relied on For Jurisdiction*

Cases believed to sustain jurisdiction are: *King Manufacturing Co. v. City Council of Augusta* 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801; *Jamison v. Texas* 318 U.S. 413 63 S.Ct. 669, 87 L.Ed. 869; *Breard v. City of Alexander* 341 U.S. 622, 69 S.Ct. 742, 95 L.Ed. 1233; *Lathrop v. Donahue* 367 U.S. 820, 823, 81 S.Ct. 1826, 6 L.Ed. 1191 (1961).

(v) *Ordinance Involved*

The ordinance involved was enacted January 14, 1972 – designated as Section 330.313, Chapter 71-552-519 of the Ordiance Code of the City of Jacksonville, Florida – and reads:

> "BE IT ORDAINED by the Council of the City of Jacksonville:
>
> Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:
>
> 330.313. *Drive-In Theatres, Films Visible From Pub-*

lic Streets or Public Places. It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. USDs 2-5 Excepted." Chapter 71-552-519.

(c) *Question Presented*

WHETHER THE FIRST AMENDMENT TOLERATES A CITY ORDINANCE WHICH CRIMINALIZES – AS A PUBLIC NUISANCE PER SE – EXHIBITION OF – "ANY MOTION PICTURE" AT A DRIVE-IN THEATER – HAVING SCENES IN WHICH THE "HUMAN MALE OR FEMALE BARE BUTTOCKS, OR HUMAN FEMALE BARE BREASTS, OR HUMAN MALE OR FEMALE BARE PUBIC AREAS ARE SHOWN . . . VISIBLE FROM ANY PUBLIC STREET OR PUBLIC PLACE"?

(d) *Statement of the Case*

On March 13, 1972, a summons was served on Erznoznik, as Manager of the University Drive-In Theater, charging him with violating the said Ordinance by showing a film, "Class of '74", in that he:

> ". . . did knowingly exhibit a motion picture in which the human female buttocks and bare breasts were shown, and said scenes were visible from a public street and a public place, to-wit: Resurrection Catholic Church, located on Jack Road, Jacksonville, Duval County, Florida. Said violation being contrary to Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville, Florida."

Erznoznik appeared before the Municipal Court – as commanded by the summons – on April 6, 1972 – but his arraignment was continued, indefinitely, pursuant to a stipulation between his counsel and counsel for the City of Jacksonville, hereinafter called the City – that he would commence an action in the Circuit Court for a Declaratory Judgment – testing the Ordinance's Constitutionality.

Erznoznik brought the Declaratory Judgment action by a Complaint alleging that the Ordinance despoils the First Amendment and the Fourteenth Amendment in that its purport is:

> (1) To make unlawful the exhibition of a non-obscene motion picture at a drive-in theater which may not be made unlawful when exhibited at an indoor theater because of the protection afforded by the First Amendment to the Constitution of the United States; and,
>
> (2) To make criminal and authorize the suppression of a motion picture protected by the First Amendment of the Constitution of the United States on the pretense that such an exhibition constitutes a public nuisance; and,
>
> (3) To declare criminal and a public nuisance an act that is not criminal or a nuisance in fact; and,
>
> (4) To make criminal – as a public nuisance – the

exhibition of a motion picture at a drive-in theater containing scenes of "the human male or female bare buttocks, the human female bare breasts, or the human male or female bare pubic areas," notwithstanding that it cannot be demonstrated that such scenes tend to corrupt the public morals or manners of the people of the City and therefore the classification is arbitrary and unreasonable as a matter of law; and,

(5) To impose strict or absolute criminal liability upon the showing of motion pictures at drive-in theaters containing scenes as described in the preceding subparagraph, notwithstanding that the First Amendment to the Constitution of the United States mandates that scienter be proven to support a prosecution intended to suppress such a motion picture.

At trial – held December 20, 1972 – the City moved for Involuntary Dismissal, arguing "that the nuisance in question is a nuisance per se as opposed to a nuisance (per) accidens" – a species of nuisance the City's counsel had "never come across . . . before this particular litigation."

The City argued further:

> (1) *That "Now, we are not dealing with the question of obscenity. We cannot be drawn and should not be drawn into having to prove any of the legal definitions of obscenity . . .*"; and,
>
> (2) That "as authority for doing the type of thing that the City of Jacksonville has seen fit to do (we rely on) the case of *Chemline, Inc. v. City of Grand Prairie* 364 F.2d page 721" where the Fifth Circuit upheld an ordinance . . . practically identical to the ordinance in question."

After the Motion for Involuntary Dismissal was denied – the City called witnesses – among them a police officer who testified that the University Drive-In screen could be seen from public streets and public places – that he had "been out there . . . when movies are shown . . . showing bare female breasts" – that he had "had occasion to observe . . . individuals outside the premises parked . . ." – that they "were just sitting there . . . watching a movie I presume."

Another police officer testified that he had been to the University Drive-In area and had seen "there were people there viewing it"; that he had "been out to make these observations . . . approximately five times in the last year."

And Joyce Chaffee testified that she lived nearby; that she had a "son nine and . . . a daughter 16 and . . . another daughter 17"; that she could observe the University Drive-In screen from her house and "It's an embarrassment."

The trial court found that "The evidence . . . showed the screen is easily seen and the pictures are actually viewed by the public from the public streets . . . and the *Court takes notice of the fact children as well as adults make up the public*" – and concluded:

> "2. The ordinance in question is constitutional in that it does not violate any protection granted to the plaintiff by the provisions of the Constitution of the United States of America or the State of Florida.
>
> * * *
>
> "4. A municipality's right to declare and abate public nuisances is well grounded in the law. A legislative finding by the City that a certain matter is a public nuisance is entitled to great deference by the Courts and the plaintifff has the burden in demon-

strating its invalidity. Plaintiff has not carried that burden.

"5. The Court concludes that plaintiff has not demonstrated that the classification established by the ordinance is arbitrary or unreasonable. Indeed, it is apparent that the ordinance is reasonably related to a legitimate legislative purpose and that this court should not substitute its judgment for the legislative body which enacted it. (R. 25)

"6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles is involved. Redrup v. New York 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967).

* * *

"8. As stated in *Chemline, Inc. v. City of Grand Prairie* 364 F.2d 721 (5th Cir., 1966):

> 'It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing "bare buttocks" or "bare female breasts" or "striptease, burlesque or nudist-type scenes which constitute the main or primary material."'
>
> "Wherefore, it is (R. 26)
>
> "ORDERED AND ADJUDGED that:
>
> "The Court having found the Ordinance 71-552-519 of the City of Jacksonville to be constitutional and

> a valid exercise of the police power of said city, the plaintiff's prayer for a declaration by this court that said ordinance is unconstitutional is denied." (R. 27)

The full text of the trial court's final judgment is attached as Exhibit IV.

The first District affirmed Per Curiam, citing *Chemline Inc. v. City of Grand Prairie*, supra, as controlling:

> "PER CURIAM.
>
> "Affirmed. See Chemline, Inc. v. City of Grand Prairie 364 F.2d 721 (5th Cir., 1966).
>
> "RAWLS, C. J., and SPECTOR and JOHNSON, J.J., concur." (288 So.2d 260)

Rehearing was denied February 5, 1974. (288 So.2d 260)

The Florida Supreme Court denied Certiorari – April 25, 1974 – with three judges dissenting. (294 So.2d 93)

(e) *Substantiality of Federal Question*

A city ordinance – for the purpose of satisfying this Court's jurisdiction over an appeal from a State Court – pursuant to 28 U.S.C. 1257(2) – is deemed a state statute. *King Manufacturing Co. v. City Council of Augusta,* supra; *Jamison v. Texas,* supra; *Breard v. City of Alexander,* supra.

A substantial federal question is presented because – among other things, city ordinances, virtually identical with the one contested, here – have been litigated – and passed on – in the Fifth and Seventh Circuits – with polar results.

More particularly, the Fifth Circuit approved such an ordinance in *Chemline, Inc. v. City of Grand Prairie,* supra – and the seventh Circuit disapproved and struck down such

an ordinance in *Cinecom Theatres Midwest States v. City of Fort Wayne* 473 F.2d 1297 (1973); see also *Grove Press v. City of Philadelphia* 300 F.Supp 281 [E.D. Pa., 1969, aff'd 418 F.2d 82 (1969)]; *Near v. Minnesota* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).[1]

The Fifth Circuit's *Chemline* opinion – written by Judge Rives – turned on the premise that notwithstanding the absence of any showing it was enacted, specifically, to serve such an end, the Grand Prairie, Texas ordinance – in controversy there – was not offensive to the First Amendment – because it was "almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks or bare female breasts, or striptease, burlesque or nudist-type scenes which constitute the main or primary material.'"

The Seventh Circuit's *Cinecom* opinion – written by Judge Campbell – held that a Fort Wayne, Indiana ordinance – exactly like the ordinance upheld in *Chemline* – should be condemned for trespass on the First Amendment.

Judge Campbell reasoned:

That "a state or city because of its abiding interest in its youth is not without authority to limit access to minors of material which would be objectionable as to them, but which would not be obscene in its appeal to adults – as recognized in *Ginsberg v. New York* 390 U.S. 629, 88 S.Ct. 1274, 20

1. And California, Missouri and North Carolina courts have stricken down ordinances — much like Jacksonville's — aimed, expressly, at drive-in theater operations. *Burton v. Municipal Court of Los Angeles*, 441 F.2d 281 (1968); *Olympic Drive-In Inc. v. City of Pagedale*, 441 S.W. 2d 5 (Mo., 1969); *State v. Furio*, 148 S.E. 275 (1966).

L.Ed.2d 195 (1968) – which approved the "variable obscenity" doctrine;

That, however, the ordinance – in litigation – was "not an obscenity case in the typical sense" in that "the material proscribed would not be obscene even under an application of the concept of variable obscenity" – which "connotes some sort of erotic or sexual obscenity";

That the ordinance would outlaw *"any exhibition of the described nudity, regardless of context";*

That thus the question is broader than passed upon by the Supreme Court in Ginsberg – involving "the extent to which a city may – go beyond the restrictions implicit in the concept of variable obscenity" – in seeking to protect youth;

That the only case in point was the Fifth Circuit's decision in *Interstate Circuit v. City of Dallas* 366 Fed. 2d 590 (1966) – relating to classification of motion pictures as "suitable or unsuitable for children under sixteen years of age";

That, there, the Fifth Circuit said that *"while we recognize the interest of society in protecting children, we find even the child's freedom of speech too precious to be subjected to the whim of the censor";*

That the Fifth Circuit was right *"although a city possesses the authority to regulate this industry for the protection of children – the ordinance here is much broader than the permissible objective and therefore runs afoul of the First and Fourteenth Amendments";*

That *Chemline*, supra, was no longer viable:

> "Although a city possesses the authority to regulate this industry for the protection of its children from

exposure to material obscene as to them, the ordinance here is much broader than that permissible objective and therefore runs afoul of the First and Fourteenth Amendments to the Constitution. In reaching this conclusion, we are not persuaded by the Fifth Circuit Court's decision in *Chemline, Inc. v. City of Grand Prairie* 364 F.2d 721 (1966), a decision upon which the district court expressly relied. *Chemline* upheld the constitutionality of an ordinance very similar to the one enacted by the City of Fort Wayne. Aside from the substantial factual distinctions between *Chemline* and the present case, the legal considerations which have influenced our decision were neither advanced nor considered in *Chemline*. Moreover, *Interstate Circuit, Inc.* was decided subsequent to the decision in *Chemline*. For similar reasons, we choose not to be guided by the citations relied upon by the city." 473 F.2d 1302.

That neither did intrusion upon privacy justify the ordinance, particularly in view of the *Cohen v. California* decision. 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971):

> "We turn now to the second justification advanced here by the City in support of its ordinance. As an independent basis for sustaining the same portion of the ordinance, the district court found that the exhibition of this matter on a drive-in theatre screen amounted to "an assault upon individual privacy . . . in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." Redrup v. New York 386 U.S. 767, 769, 89 S.Ct. 1414, 1415, 18 L.Ed.2d 515 (1967). Although much is made of the interference that these scenes impose upon neighbors

> in the peaceful enjoyment of their homes, the ordinance itself proscribes the showing of material only if it can be seen from a public street or highway. There is no mention of individual privacy or the sanctity of the home in the ordinance."

Moreover, Chief Justice Burger and Mr. Justice Rehnquist – in their Special Concurring Opinion – in *Rabe v. Washington* 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972) – indicates a readiness to review – as raising a substantial federal question – a public nuisance ordinance regulating "display of explicit . . . (sexual) materials" at drive-in theaters – and although the ordinance – here in contest – is not restricted to proscription of "explicit materials" – nevertheless it implicates an opportunity for this Court to address, itself, to the Constitutional legitimacy of burgeoning legislation – in the various states – most often in the form of City ordinances – attempting to utilize public nuisance as a device to suppress non-obscene motion pictures. ***Burton v. Municipal Court of Los Angeles,*** supra; ***Olympic Drive-In, Inc. v. City of Pagedale,*** supra; ***State v. Furio,*** supra; See too, ***Grove Press v. City of Philadelphia,*** supra.

CONCLUSION

A first principle of First Amendment Law is that "the complex web of freedoms which make up free speech" requires that "the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment . . ." *Speiser v. Randall* 357 U.S. 513; 2 L.Ed.2d 1460; 78 S.Ct. 1332 (1958).

More precisely, "the line between speech unconditionally guaranteed and speech which may . . . be regulated, suppressed or punished is finely drawn" – and, accordingly, the "separation of legitimate from illegitimate speech calls for . . . sensitive tools . . ." *Speiser v. Randall*, supra; see, also, *Thomas v. Collins* 323 U.S. 516; 89 L.Ed. 430; 65 S.Ct. 315.

And except for *Chemline*, supra, virtually all jurisdictions – state and federal – where the question has been litigated – have held that public nuisance is not such a "sensitive tool" – but, on the contrary, a blunderbuss – unacceptable, inherently, to the First Amendment – when sought to be employed to define and punish speech. *Cinecom Theaters Midwest States v. The City of Fort Wayne*, supra; *Grove Press v. The City of Philadelphia*, supra; *Burton v. Municipal Court of Los Angeles*, supra; *Olympic Drive-In, Inc. v. The City of Pagedale*, supra; *State v. Furio*, supra.

Only this Court can settle the debate as to the propriety of public nuisance legislation vis a vis the First Amendment – and, more specifically, whether such legislation can be used to cirminalize fleeting, evanescent glimpses of certain parts of the human anatomy – shown at a drive-intheater – and visible from a public street or public place.

This Court should speak.

Respectfully submitted,

.....

WILLIAM H. MANESS
603 Florida Theatre Building
Jacksonville, Florida 32202
Attorney for Appellant

PROOF OF SERVICE

I, WILLIAM H. MANESS, attorney for Richard Erznoznik, and a member of the Bar of the Supreme Court of the United States, hereby certify on the 24th day of June, A.D., 1974, I served three copies of the foregoing Jurisdictional Statement on Harry Shorstein, Esquire, General Counsel, Consolidated City of Jacksonville, 1300 City Hall, Jacksonville, Florida, by hand delivery.

.....

ATTORNEY

APPENDIX

EXHIBIT I

Richard ERZNOZNIK, as Manager of the University Drive-In Theatre,
Appellant,

v.

CITY OF JACKSONVILLE, a municipal corporation, Appellee.

No. S-452.

District Court of Appeal of Florida,
First District.

Jan. 8, 1974.
Rehearing Denied Feb. 5, 1974.

Appeal from Circuit Court, Duval County; Major B. Harding, Judge.

William H. Maness, Jacksonville, for appellant.

T. Edward Austin, Jr., Ralph W. Nimmons, Jr., and Wayne M. Ellis, Jacksonville, for appellee.

PER CURIAM.

Affirmed. See Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966).

RAWLS, C. J., and SPECTOR and JOHNSON, J.J., concur.

EXHIBIT II

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1974

THURSDAY, APRIL 25, 1974

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Petitioner,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Respondent.

CASE NO. 45,004

DISTRICT COURT OF APPEAL,
FIRST DISTRICT

S-452

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, BOYD, DEKLE and OVERTON, JJ., concur

ADKINS, C.J., ERVIN and McCAIN, JJ., dissent

EXHIBIT III

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT OF FLORIDA

Docket No. S-452

RICHARD ERZNOZNIK, as
Manager of the University
Drive-In Theatre,

Appellant,

v.

CITY OF JACKSONVILLE,
a municipal corporation,

Appellee.

NOTICE OF APPEAL

Notice is hereby given that RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre, appellant above named, hereby appeals to the Supreme Court of the United States from the Order, Opinion and Judgment of this Court entered in the above styled cause January 8, 1974, re-hearing denied February 5, 1974 and on which the Supreme Court of Florida denied appellant's Petition for Certiorari April 25, 1974.

This direct appeal is taken under Section 1257(2) of Title 28, U. S. Code.

All parties hereto are hereby required to take notice of this appeal.

/s/ WILLIAM H. MANESS

WILLIAM H. MANESS
603 Florida Theatre Building
Jacksonville, Florida 32202
Attorney for Appellant

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was served by me upon the Honorable Harry Shorstein, General Counsel, Consolidated City of Jacksonville, 1300 City Hall, Jacksonville, Florida, on the 12th day of June, A.D., 1974, by depositing the same in a United States Post Office mail box, with First Class postage pre-paid, addressed to said counsel at his post office address, as aforesaid.

/s/ WILLIAM H. MANESS

ATTORNEY

EXHIBIT IV

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CIVIL ACTION NO. 72-3430

DIVISION L

(Filed January 30, 1973)

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre,

Plaintiff,

vs.

CITY OF JACKSONVILLE, a municipal corporation,

Defendant.

FINAL JUDGMENT

This cause came on for final hearing before the Court, sitting without a jury, and having considered the testimony and arguments of counsel along with the legal memoranda filed herein makes the following findings of fact and conclusions of law.

Findings of Fact

1. On January 14, 1972, the City adopted Ordinance 71-552-519 which reads as follows:

"It shall be unlawful and it is hereby declared a pub-

lic nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibition in which the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense."

2. In March, 1972, plaintiff was charged with a violation thereof by allegedly showing a movie depicting bare female breasts and buttocks on his theatre screen at University Drive-In Theatre entitled "Class of 74" and which were viewable from a public street and public place.

3. There was a stipulation entered into between the prosecuting attorney and defense counsel, and assented to by the Municipal Court, that the prosecution would be held in abeyance pending the entry of a judgment by the Circuit Court in a declaratory judgment action to be filed by the theatre operator in the Circuit Court. The instant suit is the one contemplated by such stipulation and the Municipal Court prosecution has been held in abeyance at least to the date of the entry of this judgment.

4. The only evidence presented by the plaintiff at the final hearing in this cause was undisputed by the defendant, to-wit: that the same movie "Class of 74" was shown at two indoor theatres in Jacksonville shortly before plaintiff was charged with a violation of the subject ordinance on or about March 13, 1972.

5. The evidence of Defendant showed that the picture screen is easily seen and the pictures are actually viewed by the public from the public streets and other areas in the vicinity and the court takes notice of the fact that children as well as adults make up the public.

6. The crux of plaintiff's claim is that the subject ordinance is unconstitutional on its face. There is no effort to show unconstitutionality in the *application* of the ordinance other than to show that the same movie which may violate the ordinance when shown on an outdoor theatre screen may be shown at an indoor theatre.

Conclusions of Law

1. The Court has jurisdiction of this cause and of the parties hereto and this cause is ripe for a declaration of the rights of the parties.

2. The ordinance in question is constitutional in that it does not violate any protection granted to the plaintiff by the provisions of the Constitutions of the United States of America or the State of Florida.

3. The subject ordinance is a valid exercise of the police power of the defendant City. Under Chapter 67-1320, Laws of Florida, the Charter of the City of Jacksonville, the City has been delegated the broadest powers possible including the power to "make regulations and take actions to promote the general health, welfare and safety of the inhabitants and to prevent, abate and remove nuisances."

4. A municipality's right to declare and abate public nuisances is well grounded in the law. A legislative finding by the City that a certain matter is a public nuisance is entitled

to great deference by the Courts and the plaintiff herein has the burden in demonstrating its invalidity. Plaintiff has not carried that burden.

5. The Court concludes that plaintiff has not demonstrated that the classification established by the ordinance is arbitrary or unreasonable. Indeed, it is apparent that the ordinance is reasonably related to a legitimate legislative purpose and that this court should substitute its judgment for the legislative body which enacted it.

6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles is involved. *Redrup* v. *New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed2d 515 (1967).

7. Although there is no evidence before the Court as to the commercial effects on plaintiff's business of the type ordinance involved herein, the restrictions which will be imposed upon plaintiff in the manner of operating his drive-in theatre are reasonable and well within the power of the City to impose. As stated by the Supreme Court:

> "The Constitution's protection of property rights does not make a state or a city impotent to guard its citizens against the annoyances of life because the regulations may restrict the manner of doing a legitimate business."
>
> *Beard* v. *Alexander*, 341 U.S. 632 (1950).

8. As stated in *Chemline, Inc.* v. *City of Grand Prairie*, 364 F.2d 721 (5th Cir. 1966):

> "It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare female breasts' or 'striptease, burlesque or nudist-type scenes which constitute the main or primary material.'"

Wherefore, it is

ORDERED AND ADJUDGED that:

The Court having found the Ordinance 71-552-519 of the City of Jacksonville to be constitutional and a valid exercise of the police power of said city, the plaintiff's prayer for a declaration by this court that said ordinance is unconstitutional is denied.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 30th day of January, A.D., 1973.

(S) MAJOR B. HARDING

JUDGE

Copies: William H. Maness, Esquire

T. Edward Austin, Esquire